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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 661

FRED A. CARLSON, E. D. DITTO, SMILEY F. GRIFFEY, JOHN THOMAS HOLT, EARL MURRAY, JR., ARTHUR OWENS, JOHN L. OWENS, FLOYD C. PETTY, PAUL PRATT, MAX REIMER, WAYNE SISCO AND WILLIAM L. WATTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 519-533) is reported at 187 F. 2d 366.

JURISDICTION

The judgments of the Court of Appeals were entered on February 19, 1951 (R. 533-541). Petition for rehearing (R. 543-551) was denied on

March 9, 1951 (R. 555). The petition for a writ of certiorari was filed on April 6, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether petitioners' convictions for conspiracy to violate the National Stolen Property Act could properly be affirmed when the court below reversed their convictions for the substantive offense on the ground that there was insufficient evidence that stolen wheat transported in interstate commerce was of the value of $5,000 or more.

STATUTE INVOLVED

Section 7 of the National Stolen Property Act, 53 Stat. 1179 (18 U.S.C. (1946 ed.) 418a),[1] provided:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

Section 3 of the National Stolen Property Act, 48 Stat. 794, as amended, 53 Stat. 1178 (18 U.S.C. (1946 ed.) 415),[2] provided in pertinent part as follows:

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[1] This statute was repealed by Act of June 25, 1948, c. 645, 62 Stat. 683, sec. 21, effective September 1, 1948, and is now covered generally by 18 U.S.C. 371.

[2] This section is now covered by 18 U.S.C. (Supp. III) 2314, which reads in pertinent part as follows:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *

STATEMENT

An indictment in two counts (R. 5-10) was filed in the United States District Court for the District of Kansas charging that (1) in 1948 petitioners conspired to violate the National Stolen Property Act by agreeing to transport in interstate commerce a quantity of wheat, exceeding $5,000 in value, theretofore taken feloniously by fraud; and (2) that petitioners did transport in interstate commerce from Oklahoma to Wichita, Kansas, approximately 3480 bushels of wheat having a value of more than $5,000, which they had theretofore obtained unlawfully. Following a trial by jury,

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"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * * * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

It will be noted that it eliminates the clause, "theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin."

petitioners were found guilty on both counts (R. 12-15),[3] and were sentenced to three years' imprisonment on each, the terms to run concurrently (R. 22-35). On appeal, the Court of Appeals unanimously reversed the convictions for the substantive offense on the ground that there was insufficient evidence the stolen wheat transported in interstate commerce was of the value of $5,000 or more. The convictions on the conspiracy count were affirmed by a divided court, the majority holding that there was sufficient evidence from which the jury could infer the existence of an agreement to transport stolen wheat of the requisite value, even though the value of the stolen wheat actually transported was not established. (R. 519-533.)

The evidence adduced by the Government generally tended to prove the following:

Having purchased five loads of wheat on June 17, 1948, from a grain elevator operated by one Sherrod, in Ponca City, Oklahoma (R. 94-95, 135-136), petitioners Holt, Arthur Owens, Petty, Sisco, and Watts, apparently traveling as a group (R. 79, 82-83, 85-86, 95-97, 134-136),[4] on June 20, 1948, returned to the Sherrod elevator in three trucks with

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[3] Five co-defendants indicted with petitioners were acquitted on both counts by the same jury (R. 12-14).

[4] Petitioner Reimer was also associated with this group (R. 86, 104), and so was John Owens (R. 136). Petitioners Arthur Owens, Petty, Sisco, Murray, and John Owens stayed in a motel at Ponca City up to June 18, 1948 (R. 522). Petitioners Holt, Murray, Arthur Owens, Petty, Pratt, Reimer, Sisco, and Watts stayed at hotels in Alva, and Cherokee, Oklahoma, from June 19 through June 21, 1948 (R. 81-86, 522).

"pup trailers"[5] and purportedly purchased 1,452 bushels and 30 pounds of wheat at $2.14 per bushel, paying therefor $3,346.28 in cash (R. 96-100, 103, 104, 126). Two of the truck and trailer outfits were loaded with the wheat to capacity, but the third outfit was loaded between four and six inches from the top at the request of one of the petitioners (R. 127-129). Because the scale at Sherrod's was set at an incline and was too small to weigh the loaded vehicles, a neighboring scale was used (R. 100). This scale, however, was too short to accommodate a complete truck-trailer outfit at one time. Consequently, the trucks were weighed separately from the trailers, a jack being placed under the tongue coupling the truck and the trailer, presumably to lift the weight from the portion of the outfit which was not on the scale (R. 102, 125-127, 130-131, 140).[6] Sherrod testified that he

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[5] "Pup trailers" are two-wheeled trailers hooked on by a long tongue, to a bob-tailed truck (R. 98, 202).

[6] The weighing procedure was as follows: The truck was driven on the scale while the trailer remained off the scale. Then a hydraulic jack was placed off the scale and under the tongue coupling the trailer with the truck, and after the nut and bolt assembly on the hitch was removed the tongue was jacked up about an inch so as to, presumably, disengage the two vehicles. While the trailer was jacked up thus, the truck was weighed. Then the truck was driven off the scale and the trailer pulled on the scale. The jacking process was repeated, except that while weighing the trailers the jack was allowed to rest on the scale (R. 101-102, 124-125, 126-127, 130-131, 140). The same procedure was followed in weighing the vehicles empty and loaded (R. 131).

It seems that during the weighing of all three outfits, Sisco drove the vehicles on and off the scales, Petty jacked them up, and Arthur Owens disengaged the coupling pins (R. 101, 131-132).

was inveigled into adopting this weighing technique (R. 101-102). In his first experience with these petitioners, he had observed that the springs on the trucks "squatted," after the jack was removed, but was assured by Holt that this was due to the fact that the trucks were "heavy on the front" and had to be loaded "heavy on the front" (R. 100, 102, 122-123). Cognizant of that experience with petitioners and again observing their practices his suspicions returned (R. 100, 112). Subsequently, after roughly computing the quantity of wheat loaded on the same vehicles on the two occasions, Sherrod concluded that there was an apparent discrepancy of 200 bushels in the capacity of these vehicles, and that he had been defrauded of at least that quantity of wheat (R. 111, 112-113).[7]

Following the transaction of June 20, the petitioners involved therein stayed at nearby hotels and on June 22, cleared the port of entry at Caldwell, Kansas,[8] where they reported their destination as Wichita, Kansas (R. 150-151).

On June 22, 1948, petitioner Carlson arranged

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[7] About a week or 10 days following the last transaction, Sherrod commenced a civil action, based on fraud, against the petitioners involved in the two transactions mentioned (R. 108-109). Shortly before the trial in this case, petitioners' attorney offered $2,000 to compromise any liability involved in that action, but Sherrod declined to accept the offer (R. 105-108).

[8] Here petitioners driving the trucks executed and signed Applications for Vehicle Registration Receipt and Clearance Certificate, showing description and ownership of vehicle, the cargo carried, and its weight, and the routing, as required by

with a grain elevator operator at Braman, Oklahoma, for the purchase of four loads of wheat at $2.11 per bushel (R. 53-55, 62, 65, 326-327). Later that day he and petitioners Ditto, Griffey and John Owens loaded on four semi-trailer trucks a purported 2,086 bushels and 30 pounds of wheat, for which Carlson paid $4,402.56 in cash (R. *ibid.*, 61-65, 70-72, 521).[9] The scale at Braman was adequate for weighing each vehicle in one operation (R. 60). During the weighing operation Carlson and some of his associates lounged beneath the scale beam in the scale house. Although nothing irregular was noticed at that time, and although it was not connected with the presence of Carlson or any of his men around the scale beam, there was one instance when some difficulty was encountered in weighing a vehicle because the scale was "nervous" and would not balance. (R. 57-58.)[10] These four loads of wheat were transported the same day,

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the laws of Kansas (R. 143-146). These applications showed the petitioners involved as either owners or drivers of the trucks concerned (R. *ibid.*, 151), and the consecutiveness of their serial numbers showed that those petitioners cleared the port at approximately the same time (R. 151-152).

[9] The seller testified that Carlson gave the name of "Clark Grain Company, Kansas City," as the purchaser of the wheat (R. 57), although the record fails to show the existence of such a company (R. 521), and Carlson himself admitted that he had never heard of a Clark Grain Company (R. 327).

[10] There was some testimony, however, that the seller became suspicious of this transaction with the petitioners involved, but that he didn't think he had enough evidence "to bring charges" against them, especially since his losses were "abnormally large that year" because of the piling of a large quantity of wheat on the ground (R. 60).

June 22, via the port of entry at South Haven, Kansas, [11] en route to Wichita, Kansas (R. 150).

Also on June 22, 1948, petitioner Murray negotiated with the operator of a grain elevator at Jet, Oklahoma, for the purchase of two loads of wheat at $2.19 per bushel (R. 88-90). Later, on the same day, a purported 1,112 bushels and 50 pounds of wheat, for which $2,437.11 was paid in cash, was loaded into two semi-trailer trucks[12] driven by Murray and another (R. 89, 311, 521). Murray drove both loaded trucks on the scale, which was too short to weigh the complete tractor-trailer outfit at the same time, necessitating double operations for each outfit, both in weighing them empty and when laden (R. 87-92, 311). The seller did not observe any irregularities in the weighing procedure and did not know whether he was defrauded as a result of his transaction with Murray (R. 91-92). Later that day, these two trucks passed through the port of entry at Caldwell, Kansas, en route to Wichita, Kansas (R. 151, 311).

In the afternoon of June 22, 1948, before any of the trucks arrived in Wichita, petitioner John Owens arranged for the sale of nine loads of wheat,

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[11] Port of entry applications, which these petitioners executed themselves, disclosed transportation of wheat from Braman, Oklahoma, to Wichita, Kansas, in each of the four instances except one where the routing was stated to be from Wichita to Wichita. The latter statement was evidently an error, since otherwise it disclosed the same information as on the other three trucks, including the route to be followed. (R. 150, 157.)

[12] These two trucks were owned by petitioners Holt and Watts (R. 521).

represented to contain approximately 6,000 bushels, at $2.09 per bushel, to the Kansas Milling Company, at Wichita, Kansas (R. 174-175, 177). This price was less than the price paid by any of the petitioners for the wheat purchased in Oklahoma, as set forth above. Between 9 and 10 o'clock that night, the entire group of nine trucks owned by Carlson, Ditto, Griffey, Holt, John Owens, Pratt, Reimer, and Watts (R. 155-161, 181-182), were lined up consecutively at the Kansas Milling Company, where they were unloaded between that time and 3 A. M. the next morning (R. 185-188, 201-205, 219-223, 232-234). All the truck owners and the rest of the petitioners, except Sisco, were identified as being present during that time (R. 187-188, 195, 204, 233). They unloaded what purported to be 8,212 bushels and 40 pounds[13] of wheat (R. 320, 523) (in contrast to the 4,600 bushels purportedly purchased).[14] The scale at the Kansas Milling Company was not suitable for weighing the large tractor-trailer and truck pup-trailer equipment in one operation, thus requiring two operations for each outfit, both in weighing them laden and when empty (R. 186).[15] Murray drove all nine

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[13] A portion of the record (R. 240) indicates that 6222 bushels and 40 pounds of wheat were unloaded. This is incorrect as evidenced by the amount of the check ($17,164.28) given in payment for the wheat (R. 238-240) which, at the rate of $2.09 per bushel, was excessive for that amount.

[14] The wheat sold was grade No. 1 (R. 186).

[15] Witnesses testified that the equipment was unusually large for wheat hauling and that Brockways were a rarity in that region (R. 58-59, 197, 201).

vehicles on the scale (R. 206, 222), and in doing so jockeyed most of them in an unorthodox manner (R. 186-187, 196). In weighing the tractor-trailer outfits he would drive the tractor on the scale to the position where it was to be weighed and then deftly apply the trailer brakes very severely while leaving the tractor in gear, causing the latter to strain against the trailer brakes and its wheels to spin on dry concrete. Then, when the tractor brakes were applied, the tractor would be pulled into a crouched position against the trailer, and held in that position, with all the brakes locked, while the tractor was being weighed. (R. 206-207, 228.) Then the trailer part of the outfit, with its brakes still applied against its tandem axles,[16] would be pulled up on the scale and, invariably, the tandem axles would be pulled past the weighing point so as to require backing the tractor up against the set brakes on the trailer until the tractor wheels would slip, when the tractor brakes would be applied and the trailer weighed in that position (R. 207). In maneuver-

[16] The five Keystone trailers used by petitioners were equipped with a type of tandem axle known as T-2, which was adaptable to manipulation so as to cause a shifting of weight (R. 282-287). It consisted of two opposing rear axle castings with an equalizer between the springs and radii rods on the forward and back axles facing in opposite directions (R. 201, 284). It was the original type built by Keystone Trailer Company, but in 1947 was replaced with a T-A model (a tandem with a torque-arm between two axles), because truck operators complained that the former model caused a shifting of loads. Since 1947 T-2 type Keystone trailers were not being manufactured, save on special orders (R. 284-285). The trailers owned by petitioners were 1947 or 1948 models (R. 283-284).

ing the outfits to weigh them when empty, Murray reversed this procedure (*ibid*).[17]

The scale at Kansas Milling Company was also inadequate for weighing a truck-pup-trailer outfit in one operation, and each unit was weighed separately (R. 186-187, 236). This was accomplished by jacking the tongue by which the trailer was attached to the truck and removing from it a bolt so as to, presumably, disengage the units from each other (R. 186-187, 208, 215).[18] Unusual effects, however, were observed from these operations. Although the bolt was removed from the hitch during these operations, the tension between the two units was actually not released, for if the hitch were jacked up too high it tended to raise the unit not being weighed (R. 187, 190, 192, 209-210, 215-216).[19]

On the night of June 22 and early morning of June 23, a group of the petitioners, whom Holt had registered on the afternoon of June 22, stayed in a

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[17] There is expert testimony that by these operations the center of gravity could be shifted so as to produce, in the unit being weighed, a weight which was heavier or lighter than its actual weight (R. 285-293).

[18] For description of this practice see fn. 6, *supra*, p. 5.

[19] On September 11, 1948, the police of Aberdeen, South Dakota, inspected petitioner Holt's truck and pup-trailer outfit and jacked up the hitch connecting the two units but could not disengage the two from the hitch even though the bolt therefrom had been removed—the tubular tongue remained stationary. It was discovered that there was a long rod running underneath the truck from about the middle of it through the tubular tongue to the rear axle of the trailer, and unless this rod were removed the trailer could not be lifted from the truck by jacking their hitch (R. 256, 259, 260-263).

motor court in Wichita, Kansas (R. 245-253). On the morning of June 23, Kansas Milling Company paid Owens $17,164.28 by check (R. 238-240), which he cashed the same day (R. 243). This was almost $7,500 more than had been paid for the wheat at higher prices per bushel. That afternoon, after petitioners checked out of the motor court, the manager found a quantity of money wrappers for bills of large denominations left in the cabins occupied by some of the petitioners (R. 248).

ARGUMENT

Petitioners do not deny that there was sufficient evidence to show that they were engaged in a conspiracy to transport in interstate commerce wheat which had been fraudulently obtained. Their whole argument is based on the contention that the evidence is insufficient to establish that the conspiracy contemplated the transportation of $5,000 worth of such wheat. They argue, in effect, that since the court below held that the Government had failed to "adduce evidence from which a jury could find that stolen wheat of a value of $5,000.00 or more was in fact transported" in interstate commerce (R. 524),[20] the court should have held as

[20] We do not concede that the evidence was insufficient to warrant the guilty verdict on the substantive count. There is no doubt that wheat "purchased" by petitioners in Oklahoma was in excess of $5,000 in value. Although some of the wheat obtained was paid for, there is evidence, nevertheless, that a large portion of the wheat presumably purchased was not paid for. However, in view of the concurrent sentences, the Government could not have sought review of this question.

a necessary consequence that there was a failure of proof, as a matter of law, of the charge that petitioners conspired fraudulently to obtain wheat of such value.

It is, of course, entirely possible for conspirators to agree to do a particular act without actually accomplishing their purpose. There is thus no necessary inconsistency between acquittal on the substantive count and conviction on the conspiracy count. The sole question is, therefore, whether there was sufficient evidence to support the conclusion that petitioners conspired to transport fraudulently procured property of the requisite statutory value of $5,000 or more.

We submit that, as the majority below held,[21] substantial evidence was adduced from which the jury could reasonably infer that it was within the intendment of petitioners unlawfully to obtain wheat in Oklahoma in excess of $5,000 in value, whether or not they were successful in actually obtaining that amount. Although there was no direct evidence as to the quantity or value of the wheat illegally obtained at the three grain elevators in Oklahoma, there was ample evidence of manipulation by petitioners to obtain as much extra

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[21] Since the majority recognized that the conspiracy must contemplate transportation of fraudulently obtained goods of the requisite value, there is no conflict between this decision and *Andrews* v. *United States*, 108 F. 2d 511 (C.A. 4), or *Buchanan* v. *United States*, 164 F. 2d 15 (C.A. 8). Those cases held merely that on the particular facts presented there was insufficient evidence to establish the requisite value.

wheat as possible and evidence that such extra wheat could have equalled $5,000 in value.

Petitioners were shown to be capable of manipulating their trucks empty or full to produce substantial results in their favor. And they were willing to sell wheat in Kansas at a lower price per bushel than they paid in Oklahoma. It certainly is a reasonable inference from these facts that petitioners obtained in Oklahoma substantially more wheat than they paid for. The evidence that petitioners, at the lower price, actually received almost $7,500 more for the wheat than they paid (R. 321) indicates that their unusually large trucks were capable of carrying more than $5,000 worth of extra wheat.

Thus, having the necessary means and a fraudulent intent, it is a reasonable inference, as the court below pointed out, that petitioners' "purpose in going to Oklahoma was to defraud the vendor[s] there to the full extent of their ability" (R. 529). Their capability, as we have seen, could have been employed fraudulently to obtain wheat at least up to the value of $5,000. It was only fair to measure the scope of the conspiracy by the full extent of petitioners' ability to effectuate its object, especially where all the means available to petitioners were employed in making illicit gains, which, as a rule, could have been intended to be circumscribed only by the natural limitations of the means used. See *Phelps* v. *United States*, 160 F. 2d 858 (C. A.

8), certiorari denied, 334 U. S. 860; *United States* v. *Mortimer,* 118 F. 2d 266 (C. A. 2), certiorari denied, 314 U. S. 616; *United States* v. *Potash,* 118 F. 2d 54 (C. A. 2), certiorari denied, 313 U. S. 584; *United States* v. *Anderson et al.,* 101 F. 2d 325 (C. A. 7), certiorari denied, 307 U. S. 625.

Petitioners argue, however, that the evidence showing their manipulations of the weights in Kansas is inconsistent with and therefore precludes an inference that they could have manipulated the scales in Oklahoma so as fraudulently to obtain there wheat of a value of $5,000 or more (Pet. 18-22). The short answer to this is that petitioners erroneously assume that the evidence as to their manipulations in Kansas is inconsistent with the proof as to their capability of manipulating the scales in Oklahoma to that extent. The latter proof, as we have shown, reasonably supports the inference that petitioners intended to obtain by fraud wheat of value in excess of $5,000 and to transport it in interstate commerce.

CONCLUSION

No conflict of decisions or question of general importance is involved in this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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